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Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1596

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, *et al.*,
Petitioners,

v.

MOW SUN WONG, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

BRIEF FOR THE RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 500 F.2d 1031 (9th Cir. 1974). The opinion of the United States District Court is reported at 333 F.Supp. 527 (N.D. Cal. 1971).

QUESTIONS PRESENTED

1. Whether a regulation of the United States Civil Service Commission, which bars permanent resident aliens from employment in the federal competitive civil service, violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. Whether a regulation of the United States Civil Service Commission, which bars permanent resident aliens from employment in the federal competitive civil service, exceeds the authority provided by Congressional statutes and Presidential orders, and contravenes Executive Orders Nos. 10577 and 11478.

CONSTITUTIONAL, STATUTORY, REGULATORY AND EXECUTIVE ORDER PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States, the federal Civil Service Act, the federal Civil Service Commission regulations, and Presidential Executive Orders are set forth in the Brief for the Petitioners at pp. 2-4, with the following addition:

Executive Order No. 11478, 34 Fed. Reg. 12985 (August 8, 1969), which provides in relevant part:

> Sec. 1: It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to provide the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency.
>
> Sec. 6: . . . This order does not apply to aliens employed outside the limits of the United States.

STATEMENT OF THE CASE

In 1970 the four respondents were rejected for federal employment solely because each was a permanent resident alien. The four together[1] filed the instant class action lawsuit to enjoin the United States Civil Service Commission from enforcing a regulation[2] which automatically prohibited them—because of their status as resident aliens—from applying for, let alone holding, any competitive civil service positions. Though each respondent had been admitted to the United States as a permanent resident alien, the regulation foreclosed them even from submitting an application for federal employment. Though each respondent possessed the qualifications required for the positions of janitor, file clerk, educational evaluator, and mail clerk, respectively, the regulation denied them any opportunity to utilize those abilities in federal civil service jobs.[3]

---

[1] The four respondents in this action are Mow Sun Wong, Siu Hung Mok, Francene Lum, and Kae Cheong Lui. A fifth plaintiff, Anne Yu, did not join the appeal in this case.

[2] 5 C.F.R. § 338.101 of the Civil Service Commission's regulations (reprinted at pp. 3-4 of the Brief for the Petitioners (October 1974)) [hereinafter referred to as "Pet. Br."].

[3] Since the federal government "is by far the largest single employer in the United States" (Das, "Discrimination in Employment Against Aliens--The Impact of the Constitution and Federal Civil Rights Act,", 35 *U. Pitt. L. Rev.* 499, 528 (1974)), the importance of federal employment opportunities to respondents and millions of other permanent resident aliens is obvious. As of April 1974, the domestic civilian federal work force totaled 2,708,131 employees (Bureau of Manpower Information System, Manpower Statistics Division, "Federal Civilian Manpower Statistics," p.5 (June 1974)), with more than 73,000 of these federal jobs in the San Francisco-Oakland Standard Metropolitan Statistical Area (*ibid.*). Moreover, each year, approximately 300,000 jobs in the federal civil service become available nationwide (A:9).

The backgrounds and employment experiences of the respondents demonstrate why the appellate court below found that no "compelling interest or proper government objective [exists] to justify the total exclusion of aliens from the federal competitive civil service." *Wong v. Hampton*, 500 F.2d 1031, 1039 (9th Cir. 1974). Before coming to the United States, respondent Mow Sun Wong had worked as an electrical engineer for over 10 years (A. 24). After entering this country as a resident alien, and unable to find work utilizing his engineering skills and experience, respondent Wong accepted the best job he could find: he began work in August of 1970 as a janitor under the California Supplemental Training and Education Program (STEP) (A.25). Through this program, which provides on-the-job training for its participants, respondent Wong was actually placed with a federal agency, the United States General Services Administration, to work as a janitor.[4] According to his supervisor, respondent Wong's performance in this federal job was "outstanding" (A.29), and his supervisor wished to hire him for a permanent federal position *(ibid.)*. Nevertheless, once the STEP program ended, respondent Wong was not even given an opportunity to compete for this janitorial position on any basis, since petitioners' regulation automatically prohibited the hiring of non-citizens in such federal employment.

A similar dilemma confronted respondent Siu Hung Mok. Before his arrival in the United States, he had 18 years of experience as a businessman in both China and

[4]The salaries of participants in the STEP project are paid by the California State job training program.

Macao (A.25). He also participated in the STEP project and was placed with a federal agency—as a file clerk with the Federal Records Center. His supervisor similarly found his work with the federal agency most satisfactory (A.26). Solely because of his alien status, however, respondent Mok was not allowed to be retained as a file clerk with the Federal Records Center after his STEP training program ended.

The alien status of respondent Francene Lum was likewise the sole reason why she was denied the opportunity even to apply for a position as an evaluator of educational programs with the United States Department of Health, Education and Welfare. Respondent Lum's educational background includes a bachelor of arts degree from Webster College, a masters degree in education from St. Louis University, and periods of graduate study at Stanford, Johns Hopkins, Kansas, and Seton Hall Universities (A.27). At the time the instant action was instituted, she had 15 years' experience as a teacher of mathematics and of Chinese as a second language to immigrants participating in a Manpower Development and Training Act project (*ibid.*). But, despite these impressive qualifications, she too was foreclosed from seeking any position with the federal government because she was not a citizen.

Finally, as the experience of respondent Kae Chong Lui shows, resident aliens are not even permitted to keep federal jobs if they should accidentally manage to obtain such positions. Respondent Lui was accepted by, and worked satisfactorily for, the United States Post Office loading and unloading mail (A.28). Yet, when the federal agency discovered—10 days after his hiring—that he was not a citizen, he was summarily

terminated from that job solely for that reason (*ibid.*).

The total exclusion of respondents from any employment opportunities with the federal government is tinged by the irony that three of them—respondents Wong, Mok, and Lui—actually worked for the government either through a joint federal-state manpower program or through administrative inadvertence. Nevertheless, though each performed excellently in his respective position, petitioners' regulation foreclosed them from using their abilities to continue in such federal jobs. A further irony emerges since permament resident aliens like respondents are subject to all the burdens and obligations that citizens bear, including the payment of taxes and service in the armed forces.[5] Yet, the bearing of such obligations has not been accompanied by the chance to share in the employment opportunities offered by the federal government.[6]

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[5] *Sugarman v. Dougall*, 413 U.S. 634, 645 (1973); *In re Griffiths*, 413 U.S. 717, 722 (1973).

[6] The experience of Tom Tung Bor reveals the anomalous situation in which resident aliens are placed. Arriving in this country as a child, Bor was drafted into the United States Army in 1969 and served 19 months—14 of those in Korea—before receiving an honorable discharge (A.31). During his military service, he achieved the rank of Sergeant E-5. Yet, upon returning to civilian life, he "was informed that the federal government would not hire me for any position, because I was not a citizen" (*ibid.*). The discrimination and frustration which confronted Bor are reflected in his statement that

> If the federal government deems me qualified and loyal enough to serve in its military, then I do not understand why I am not given the opportunity to be a qualified, loyal postal employee or the like (*ibid.*).

In their Complaint, respondents contended that petitioners' exclusionary regulation violated the Due Process Clause of the Fifth Amendment to the United States Constitution, exceeded the authority granted petitioners by the Congress and the President, and contravened Presidential orders[7] (A. 10-13). In a memorandum and order issued on August 30, 1971, the United States District Court for the Northern District of California rejected each of respondents' contentions and ruled on behalf of petitioners. 333 F.Supp. 527 (N.D. Calif. 1971). On appeal, the United States Court of Appeals for the Ninth Circuit reversed and held that the regulation violated the Due Process Clause of the Fifth Amendment. *Wong v. Hampton*, 500 F.2d 1031 (9th Cir. 1974). Guided by the "rationales and holdings" of this Court's decisions in *Sugarman v. Dougall*[8] and *Graham v. Richardson*[9] (*id.* at 1036-37), the Ninth Circuit found "[t]he broad sweep [of the regulation] is the vice" (*id.* at 1041). Examining the possible rationales for such a discriminatory regulation, the appellate court concluded that no "compelling

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[7] Executive Order No. 10577, 19 Fed. Reg. 7521 (Nov. 22, 1954); Executive Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969).

[8] 413 U.S. 634 (1973).

[9] 403 U.S. 365 (1971). The appellate court below recognized that while neither *Sugarman* nor *Graham* was

> squarely controlling (because they deal with the states' power to discriminate against aliens *vis-a-vis* the Fourteenth Amendment) [they] are instructive and significant . . . . *Wong v. Hampton, supra*, 500 F.2d at 1036-37.

government interest" or "logical or persuasive reason [has been] advanced as to why aliens should be excluded from all federal civil service employment" (*ibid.*).

SUMMARY OF ARGUMENT

Though the Bill of Rights contains no express equal protection provision, this Court has long recognized that the Due Process Clause of the Fifth Amendment embraces those equal protection guarantees made explicit in the Fourteenth Amendment. Similarly, in assessing the validity of federally drawn classifications under the Fifth Amendment, this Court has invoked the same standards which apply under the Fourteenth Amendment to classifications established by the states. In the instant case, petitioners' blanket exclusion of all permanent resident aliens from all employment opportunities in the federal competitive civil service must thus be subjected to the most stringent standard of judicial review. Since the discrimination suffered by respondents and millions of other resident aliens stems solely from the "suspect classification" of their resident alien status, petitioners must demonstrate that their regulation (5 C.F.R. §338.101) is necessary to promote a compelling government interest. As the appellate court below found, there can be no compelling interest sufficient to justify a regulation whose "overbreadth" and "broad sweep" serve to "automatically exclude all aliens from the competitive civil service." *Wong v. Hampton*, 500 F.2d 1031, 1040-1041 (9th Cir. 1974).

Such unjustified discrimination clearly violates the Due Process Clause of the Fifth Amendment.

Nevertheless, while it "would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" (*Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)) with respect to discrimination against resident aliens in public employment, petitioners suggest to this Court that the Constitution imposes utterly no duties on them in this area. They contend that the federal government is exempt from Fifth Amendment strictures because of "its plenary power over immigration and naturalization" (Pet. Br. 42) and because the Privileges and Immunities Clause of the Fourteenth Amendment "authorizes preferred treatment for citizens" (Pet. Br. 28).

Such an argument is unsupportable both in logic and law. To recognize that Congress may have "plenary power" over a given area does not permit petitioners to ignore the Constitution—and judicial standards enforcing the Constitution—in implementing those powers. Similarly, nothing in the Privileges and Immunities Clause exempts the federal government from the constraints of the Fifth Amendment nor authorizes it to deny resident aliens rights accorded by that amendment. The Privileges and Immunities Clause was adopted to restrict state discrimination, not to authorize federal discrimination.

Finally, petitioners' discriminatory regulation also suffers from obvious non-constitutional violations. In totally barring resident aliens from all federal employment, petitioners have clearly exceeded their discretion to establish standards for admission into the federal civil service system. Neither the Congress nor the

executive has explicitly authorized such blanket discrimination. Similarly, by foreclosing resident aliens from all federal employment opportunities, petitioners directly contravene executive orders which were issued to prevent such discrimination. These executive orders likewise require that petitioners' regulation be held invalid.

ARGUMENT

I.

THE COMPLETE EXCLUSION OF RESIDENT ALIENS FROM ALL EMPLOYMENT OPPORTUNITIES IN THE FEDERAL COMPETITIVE CIVIL SERVICE VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Over the years, this Court has carved out special judicial protection for resident aliens. The decisions of this Court "have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372-373 (1971); see also *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973). Yet, petitioners would have this Court abandon this special concern and uphold a regulation which explicitly forecloses resident aliens–solely because of their alien status–from seeking employment opportunities with the federal government. 5 C.F.R. §338.101. As this section of respondents' brief will show, the Due Process Clause of the Fifth Amendment will not tolerate such a discriminatory barrier.

A. The Due Process Clause of the Fifth Amendment Affords Equal Protection Guarantees Similar to Those in the Fourteenth Amendment.

Though no express equal protection guarantee exists in the Bill of Rights, this Court has clearly established that the Fifth Amendment contains equal protection guarantees similar to those made explicit in the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). In *Bolling*, decided the same day as *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court applied the same equal protection standard enunciated in *Brown* to strike down racial segregation in Washington, D.C., public schools as violative of the Fifth Amendment. The "liberty" guaranteed by the Due Process Clause of the Fifth Amendment "extends to the full range of conduct which the individual is free to pursue" in relation to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). For the federal government to classify children on the basis of race not only deprives them of their liberty,[10] but

[10] It is significant that the "liberty" involved in *Bolling* was not the right to an education, but the right to receive equal educational opportunities. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29-39 (1973). Similarly, respondents in this case do not suggest (contrary to petitioners' contention, Pet. Br. 50, n.41) that there is a right to public employment, but, rather, that the Fifth Amendment affords " 'a constitutional right to be free from unreasonably discriminatory practices with respect to such employment.' " *Wong v. Hampton*, *supra*, 500 F.2d at 1038. This Court itself has continually recognized that one of the most basic of all liberties is the right of a person, citizen or non-citizen, to be free to secure employment with equal opportunity. *E.g.*, *Sugarman v. Dougall*, *supra*, 413 U.S. at 641; *Graham v. Richardson*, *supra*, 403 U.S. at 379-380; *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Smith v. Texas*, 233 U.S. 630, 636 (1914).

constitutes "discrimination . . . so unjustifiable as to be violative of due process." *Ibid.* To hold otherwise, this Court recognized, would have created a most anomalous situation. Because the *Brown* decision held

> that the Constitution prohibits the states from maintaining racially segregated public schools, it would be *unthinkable* that the same Constitution would impose a lesser duty on the Federal Government. *Id.* at 500 (emphasis added).[11]

Since *Bolling*, this Court has reaffirmed that the Constitution does not permit a double standard which would allow the federal government to engage in discriminatory practices foreclosed to the states. A long line of decisions reveals that this Court will not tolerate any distinctions between the standards appropriate for assessing the validity of state and federal classifications.[12] In *Shapiro v. Thompson*, this Court invoked

[11] *Accord, Frontiero v. Richardson*, 411 U.S. 677 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Shapiro*, after invalidating state residency requirements for welfare benefits as violative of equal protection, this Court employed the same "reasons" to strike down a similar federal residency rule, "even though it was adopted by Congress as an exercise of federal power." *Id.* at 641. In a concurring opinion, Mr. Justice Stewart observed it "is necessarily true" that a compelling government interest be shown,

> whether the impinging law be a classification statute to be tested against the Equal Protection Clause, or a . . . federal regulatory law, to be tested against the Due Process Clause. *Id.* at 644.

[12] *E.g., Johnson v. Robison*, ____ U.S. ____, 94 S. Ct. 1160, 1164, n.4 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 680, n.5 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964). See also *Wong v. Hampton, supra*, 500 F.2d at 1038.

the stringent compelling governmental interest test in striking down state residency requirements for welfare benefits as violations of the Equal Protection Clause of the Fourteenth Amendment. 394 U.S. 618 (1969). The *Shapiro* decision, in also invalidating similar requirements imposed by the District of Columbia, imposed the same stringent constitutional standards on the federal government:

> "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" [Citations omitted] For the reasons we have stated in invalidating the Pennsylvania and Connecticut provisions, the District of Columbia provision is also invalid . . . . 394 U.S. at 642.[13]

The uniform holdings of this Court make it clear that similar standards must be applied under the Due Process Clause to federal actions which—had such actions been practiced by the states—would be subject to close judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Thus, contrary to petitioners' unsupported inferences (Pet. Br. 52), this Court's decision in *Sugarman v. Dougall* is clearly applicable to the instant case and is not distinguishable because the Fifth Amendment guarantees against unjustifiable discrimination while the Fourteenth

[13] Similarly, in *Frontiero v. Richardson*, while only a plurality of this Court found that sex is a suspect classification, none of the eight Justices who joined the result questioned the application of identical equal protection standards to the federal government under the Fifth Amendment. 411 U.S. 677, 691 (concurring opinion of Mr. Justice Powell, in which Mr. Chief Justice Burger and Mr. Justice Blackmun joined, and concurring opinion of Mr. Justice Stewart).

Amendment guarantees equal protection. As this Court stated last term:

> [I]f a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment.[14]

B. Since the Discrimination Suffered by Respondents is Based Solely on the "Suspect Classification" of Their Resident Alien Status, this Court Must Invoke the Closest Judicial Scrutiny to Ensure the Protection of Constitutional Rights.

In denying resident aliens the opportunity to apply for–let alone hold–virtually all jobs with the federal government, petitioners are admittedly discriminating against respondents solely because of their non-citizen status. 5 C.F.R. §338.101. Yet, it is beyond dispute today that discrimination on the basis of alienage constitutes a "suspect classification" which requires a stringent judicial standard of review.[15] This Court in *Sugarman* explicitly reiterated its 1971 holding that:

> [C]lassifications based on alienage, like those based on nationality or race, are inherently suspect

[14] *Johnson v. Robison*, ____ U.S. ____, 94 S. Ct. 1160, 1164, n.4 (1974).

[15] *E.g.*, *Sugarman v. Dougall*, *supra*, 413 U.S. at 642; *In re Griffiths*, 413 U.S. 717, 721 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 420 (1948); *Oyama v. California*, 332 U.S. 633, 640 (1948).

> and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate.[16]

Since resident aliens possess the "traditional indicia of suspectness" which require the invocation of strict judicial scrutiny,[17] it is conceptually consistent that this Court has carved out special judicial protection for them. Resident aliens like respondents fall directly within the ambit of such protection because they are members of a class

> saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[18]

This Court's decisions of the past few years openly recognize the hostile and discriminatory treatment from which aliens historically have suffered. The holdings of *Graham*, *Sugarman*, and *Griffiths* expressly reject the notion that aliens may today be treated oppressively and differentially merely because the majority population may view them as "foreigners" to be scorned and treated as constitutional outcasts.[19] Indeed, the

[16] *Graham v. Richardson*, *supra*, 403 U.S. at 372 (1971) (footnotes and citations omitted), cited in *Sugarman v. Dougall*, *supra*, 413 U.S. at 642.

[17] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).

[18] *Ibid.*; *Johnson v. Robison*, ____ U.S. ____, 94 S. Ct. 1160, 1169-70, n.14 (1974).

[19] In *Griffiths*, Mr. Justice Powell traced the rise and fall of the anti-alien doctrine which historically sustained certain legal restrictions upon aliens. *In re Griffiths*, 413 U.S. 717, 719-720 (1973); *see also Sugarman v. Dougall*, *supra*, 413 U.S. at 644-645. These decisions stand as an explicit rejection of such a doctrine.

stricter doctrinal approach invoked by this Court toward alien classifications is based on a recognition that

> [f]rom its inception, our Nation welcomed and drew strength from the immigration of aliens. Their contributions to the social and economic life of this country were self-evident, especially during the periods when the demand for human resources greatly exceeded the native supply.[20]

Petitioners do not dispute the vast contributions made by resident aliens like respondents. Nor do they dispute that such aliens are "persons" within the

[20] *In re Griffiths*, 413 U.S. 717, 719 (1973); *see also Graham v. Richardson, supra*, 403 U.S. at 376; *Oyama v. California*, 332 U.S. 633, 646 (1948). Lower courts, such as the Court of Appeals in the instant case, have uniformly applied this new stricter standard of judicial scrutiny toward aliens. These courts have protected resident aliens from invidious legislation promulgated for no other reason than to harm or punish them as a politically unpopular group—whose very political impotence makes it virtually impossible to seek redress through normal processes. *E.g., Jalil v. Hampton*, 460 F.2d 923 (D.C. Cir.), *cert. den.*, 409 U.S. 887 (1972); *Sam Andrews' Sons v. Mitchell*, 457 F.2d 745 (9th Cir. 1972); *Chapman v. Gerard*, 456 F.2d 577 (3rd Cir. 1972); *Nielsen v. Secretary of Treasury*, 424 F.2d 833 (D.C. Cir. 1970); *Ramos v. United States Civil Service Comm.*, 376 F. Supp. 361 (D.P.R. 1974), *appeal docketed*, No. 74-216 (U.S. Sup. Ct. 1974); *Machado v. Dept. of Health & Rehab. Serv.*, 357 F. Supp. 890 (S.D. Fla. 1973); *Miranda v. Nelson*, 351 F. Supp. 735 (D. Ariz. 1972); *Faruki v. Rogers*, 349 F. Supp. 723 (D.D.C. 1972); *Teitscheid v. Leopold*, 342 F. Supp. 299 (D. Vt. 1972); *Zarate v. Dept. of Health & Rehab. Serv.*, 347 F. Supp. 1004 (S.D. Fla. 1971); *Younus v. Shabat*, 336 F. Supp. 1137 (N.D.Ill. 1971); *United States v. Kahn*, 336 F. Supp. 354 (E.D. Pa. 1971); *Hosier v. Evans*, 314 F. Supp. 316 (D.V.I. 1970).

meaning of the Fifth Amendment (Pet. Br. 27) and members of a "suspect" category entitled to strict judicial scrutiny (Pet. Br. 62). Yet, they appear to dispute the application of such strict judicial scrutiny to the federal government. Though never explicitly stated, they suggest that classifications based on alienage—when made by the federal government as opposed to the states—are not inherently suspect and thus not subject to the strict scrutiny of the compelling governmental interest standard (*ibid.*). Not surprisingly, such a suggestion (and its resulting repugnant double standard) is without merit either in law or in logic.[21]

[21] At one point, petitioners appear to suggest that resident aliens like respondents should not be accorded special "suspect class" treatment since their condition is temporary, not permanent.

> Unlike such characteristics as race and national origin, alienage is neither a highly visible nor an "immutable" or "unalterable" trait . . . . The condition is subject to change in most cases by action of the alien (Pet. Br. 25-26).

It is altogether obvious why petitioners never pursued this specious contention. Such a contention totally contradicts the direct holdings of this Court that *aliens*, regardless of their permanent or temporary condition, are a "suspect class" entitled to close judicial scrutiny. *E.g., Sugarman v. Dougall, supra*, 413 U.S. at 642; *Graham v. Richardson, supra*, 403 U.S. at 372. Significantly, each of the named appellees in the *Sugarman* case had lived in this country more than five years, and thus qualified for naturalization as citizens under 8 U.S.C. § 1427(a). Similarly, in *Griffiths*, this Court even observed that the appellant was "eligible for naturalization . . . [but] has not filed a declaration of intention to become a citizen of the United States . . . and has no present intention of doing so." *In re Griffiths*, 413 U.S. 717, 718, n.1 (1973). Likewise, appellee Richardson in *Graham v. Richardson* was also eligible for citizenship at the time her action

Classifications on the basis of alienage, race, or national origin are "inherently"[22]–not just sometimes–suspect. The reason they are inherently suspect goes solely to the nature of the classification, not to whether it was made by the federal government or by the states. If "[a]liens as a class are a prime example of a 'discrete and insular' minority,"[23] they are no less "discrete and insular" when the federal government makes the discriminatory classification. In essence, while the suspect classification is a constant, it is measured against a variable–the relevant compelling governmental interests. Though the federal government may have different interests than the states in a given context, it must still satisfy the demands of strict scrutiny and demonstrate that its interests compellingly

was brought. *Graham v. Richardson, supra*, 403 U.S. at 367. Yet, the fact that none of these resident aliens chose to exercise their option to become citizens did not alter this Court's findings in these three major cases that they were members of a "suspect class" who deserved close judicial scrutiny.

[22] *Graham v. Richardson, supra*, 403 U.S. at 372.

[23] *Ibid.* Significantly, this Court in *Graham* could have avoided finding alienage to be a suspect classification by basing that decision solely on Congress' regulation of immigration and naturalization. *Id.* at 376-380. By purposely reaching the constitutional discrimination issue as well, *Graham* shows that this Court wished to carve out explicit protections against disparate treatment of aliens, regardless of whether such treatment flowed from the federal government or the states. See Note, "Constitutional Protection of Aliens," 40 *Tenn. L. Rev.* 235 (1973).

justify the discrimination against aliens. *E.g., Wong v. Hampton, supra*, 500 F.2d at 1038-1039; *Jalil v. Hampton, supra*, 460 F.2d at 929. To otherwise allow Congress to

> single out aliens for discriminatory treatment forbidden to the states . . . would lead to a peculiar hierarchy of rules, in which the federal government would enjoy a license to engage in practices condemned by the courts as unfair and discriminatory when done by the states. *Ramos v. United States Civil Service Comm., supra*, 376 F.Supp. at 366.

Since the federal government is bound by the same Constitution, it does not "enjoy a license to engage in unconstitutional discrimination." This is especially so when the victims of such discrimination are resident aliens. As this Court recognized in 1970:

> [Although] the Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores . . . once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.[24]

To ensure the guarantee of those Constitutional rights, the discrimination suffered by respondents must "withstand the strict judicial scrutiny that this Court has found appropriate . . . [when] suspect classifications" are involved. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973). Such a rigorous standard requires not a detached and deferential approach toward administrative deter-

[24] *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 309, n.5 (1970), quoting from *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (concurring opinion).

minations, but an active and critical analysis. Petitioners must justify their discriminatory regulation by demonstrating that it is "necessary" to promote a "compelling government interest.[25] "Our standard of review of [laws] that treat aliens differently from citizens requires a greater degree of precision." *Sugarman v. Dougall, supra*, 413 U.S. at 642. As the following subsection will demonstrate, petitioners cannot even satisfy the more general "rational basis" standard of constitutional review,[26] let alone show such a "degree of precision."

C. No Compelling Governmental Interest Exists to Justify the Total Exclusion of Resident Aliens from Employment in the Federal Civil Service.

Since petitioners' regulation explicitly discriminates against members of a suspect class, petitioners carry the constitutional burden of demonstrating a compelling reason why resident aliens should be automatically excluded from seeking federal employment. As the Ninth Circuit below found, none of the possible "justifications" which can be conjured up to support the regulation rises to the level of legitimizing its discrimination based on alienage. *Wong v. Hampton, supra*, 500 F.2d at 1039-1040. Though petitioners have now created further possible justifications (Pet. Br. 52-58), these are equally wanting and are clearly insufficient to sanction the total exclusion of resident aliens from all federal employment.[27]

[25] *E.g., Graham v. Richardson, supra*, 403 U.S. at 372, 376; *Shapiro v. Thompson, supra*, 394 U.S. at 634, 638.

[26] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-173 (1973); *McGowan v. Maryland*, 366 U.S. 420 (1961).

[27] In their brief, petitioners contend the total exclusion of all resident aliens from federal employment opportunities can be sustained under either the "compelling interest" or "rational basis" test (Pet. Br. 52). As this Brief has shown, *supra*, at pp. 14-20, petitioners must assume the heavier "compelling interest" burden in justifying their discriminatory regulation. Yet, the denial to respondents and other resident aliens of employment opportunities within the federal government is so arbitrary and irrational that petitioners cannot even satisfy the less exacting "rational basis" standard of constitutional review.

Under this latter test, petitioners must demonstrate that their treatment of respondents "bear[s] some rational relationship to a legitimate [governmental] purpose." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). As the appellate court below suggested, none of petitioners' proferred justifications would satisfy even "this less onerous general rational relationship standard." *Wong v. Hampton, supra*, 500 F.2d at 1039, n.14. In the instant case, the legitimate governmental purpose concerns the operation of the federal civil service system, from which respondents are barred. The purpose of the civil service system–which evolved as a replacement to the "spoils" system (Pet. Br. 72-73)– is not to provide for the economic needs of citizens. Rather, the civil service system seeks to find, through objective methods, individuals with the ability and suitability to hold federal employment positions (5 U.S.C. §631) and who "will best promote the efficiency of that service." 5 U.S.C. §3301(1).

Clearly, citizenship–or lack thereof–in no way measures an individual's fitness or ability for a given position, nor offers any guide to achievement of the desired efficiency. Thus, even if petitioners' discriminatory regulation were tested by the rational basis standard, the fact of respondents' alienage clearly bears no rational relationship to the stated purposes for which the federal civil service was established.

Petitioners have offered four possible "interests" to satisfy their admittedly heavy burden of justifying a regulation which overtly discriminates against resident aliens (Pet. Br. 52-65). Petitioners themselves seem to recognize that their first two asserted "justifications" are of little weight in "dispos[ing] of any challenge to [the regulation's] constitutionality" (Pet. Br. 53). The first, that "for more than 100 years it has been the policy and practice of the federal government generally to limit or ban the employment of aliens" (Pet. Br. 52), surely does not justify a presumptively unconstitutional discrimination. As this Court has stated, "no one acquires a vested or protected right in violation of the Constitution by long use." *Walz v. Tax Comm.*, 397 U.S. 664, 678 (1970). In *Walz*, the length of the "unbroken practice" was cited by this Court to demonstrate that the feared government entanglement with religion never materialized from granting tax exemptions to churches. The importance of such continuity was explained by this Court three years later:

> [H]istorical acceptance without more would not have sufficed [in Walz]. . . . It was the reason underlying the long history of tolerance of tax exemptions for religion that proved controlling. *Committee for Public Educ. & Relig. Lib. v. Nyquist*, 413 U.S. 756 (1973).

In contrast, in this case, the evolving judicial protection accorded resident aliens has destroyed the "reason underlying the long history of [in]tolerance" toward the hiring of aliens in the federal government.

Nor is there substance to petitioners' second justification: that various other countries exclude aliens

from governmental employment (Pet. Br. 54-58). It has little bearing–let alone a substantial and compelling interest–that "exclusion of aliens from the civil service is a long-standing and widely-followed policy of other nations" (Pet. Br. 54). Such an "argument" ignores the clear pronouncements of this Court that "[o]ther nations are governed by their own constitutions, if any, and we can draw no support from theirs." *Afroyim v. Rusk*, 382 U.S. 253, 257 (1967). The issue in this case is whether petitioners' discriminatory regulation satisfies the Due Process Clause of the Fifth Amendment to the United States Constitution, not the laws of England, France, the Netherlands, Switzerland, or international law in general (Pet. Br. 55-58).[28]

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957).

Petitioners' third attempted justification is that the supposed "plenary federal power to regulate with respect to aliens" (Pet. Br. 58) justifies their discriminatory regulation. While respondents will deal with this inapposite argument in much detail in Part A of Section II of this Brief, *infra*, it is important here to recognize that Congressional "plenary" powers do not justify

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[28] Furthermore, if international practice served as a relevant guide in measuring the requirements of the United States Constitution, then resident aliens would be excluded from all state and municipal employment as well as from the practice of professions such as law. Yet, this Court's decisions have unequivocally ruled that states and local governments may not so discriminate against aliens in those areas. *Sugarman v. Dougall, supra; In re Griffiths, supra.*

petitioners' total exclusion of millions of resident aliens from all federal employment.[29] The existence of "plenary power to legislate with respect to immigration and naturalization" (Pet. Br. 59) cannot make constitutional what would otherwise be a violation of the Due Process Clause of the Fifth Amendment. Significantly, the exercise of this so-called plenary power has occurred in the areas of entry, deportation, and foreign relations—areas in which issues of foreign affairs, national security, and sovereignty are inevitably intertwined. *E.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580 (1951).

The instant case, however, does not involve such paramount issues of this country's sovereignty and security. Rather, respondents seek simply the opportunity to apply to and work for the federal government in any position where their skills can be utilized. The factors which give Congress great latitude in questions of entry and deportation are simply not germane to a resident alien's employment goals or abilities.

Admittedly, as petitioners suggest, "a federal law or regulation concerning aliens may well be constitutional even though an identical state statute would be invalid" (Pet. Br. 62). Yet, the reason for this possible dichotomy stems not from the existence of plenary powers, but from the nature of the asserted compelling

[29]The appellate court below explicitly found this "plenary power" argument lacking as a possible justification for petitioners' discrimination.

> To state that Congress' plenary power over aliens enables the federal government to unreasonably discriminate against aliens, neglects to consider the fact that even Congressional plenary power is subject to Constitutional limits. *Wong v. Hampton, supra*, 500 F.2d at 1036.

interest. In some instances, it might be possible to find that a federal law advances a compelling interest while a similar state statute promotes no compelling state interest.[30] However, in this case, the mere existence of a plenary power in areas of foreign affairs or alien entry and deportation in no way constitutes, in and of itself, the substantial and compelling federal interest necessary to justify this discriminatory regulation.[31]

[30]On the other hand, so long as they are necessary to promote a compelling governmental interest, both federal (Appendix. Pet. Br.) and state laws which classify on the basis of citizenship might survive constitutional scrutiny. *E.g.*, *Sugarman v. Dougall*, 413 U.S. at 647-648; *Wong v. Hampton, supra*, 500 F.2d at 1041.

[31]Petitioners intimate support for their "plenary power" rationale by distinguishing *Sugarman v. Dougall*, in which this Court struck down a New York statute denying aliens the right to hold positions in that state's competitive civil service. 413 U.S. 634 (1973). Petitioners claim the vice of the New York exclusion was that it reached beyond the "narrow limits of state power to legislate with respect to aliens" (Pet. Br. 58). Such vice, they suggest, is not present in the instant case because of "the existence of comprehensive federal power to regulate with respect to aliens" (Pet. Br. 59).

Ironically, this very issue of New York's reaching beyond its "narrow limits" (Pet. Br. 58) and "legitimate state interests" (Pet. Br. 58-59) was explicitly *not* decided by this Court in *Sugarman*. This Court held that the New York statute violated constitutional guarantees of equal protection because it "denies all aliens the right to hold positions in New York's competitive civil service." 413 U.S. at 646. Since the *Sugarman* case was decided on this constitutional basis, this Court said

> we need not reach the issue whether the citizenship restriction is in conflict with Congress' comprehensive regulation of immigration and naturalization (*ibid.*).

Petitioners also make a desperate attempt to bolster their inapplicable plenary power argument by speculating about

Finally, petitioners indulge in such generalities as "sovereign nation," "undivided allegiance," and "loyalty" in attempting to meet their heavy burden of a substantial, compelling and legitimate governmental interest (Pet. Br. 63-65). They apparently feel that a citizen will be more loyal to the federal government than an alien, since the latter "in most cases still owes an affirmative duty of allegiance to a foreign nation" (Pet. Br. 64). Naturally, petitioners have offered no proof in support

possible adverse effects on foreign relations and treaty-making (Pet. Br. 61). They suggest that opening up the federal civil service to resident aliens might

> deprive [the government] of the basis for negotiating the reciprocal termination of comparable discrimination against the employment of American citizens in the civil services of other countries (*ibid.*).

Yet, even petitioners concede that this country's treaties "typically do not expressly cover employment in the civil service of the respective contracting parties" (*ibid.*). More importantly, the very notion of using resident aliens as "pawns" to obtain benefits for American citizens residing in other countries violates the very principles of due process of law which petitioners are required to satisfy! As the American Civil Liberties Union accurately states, it "shocks the conscience" even to consider using resident aliens as "bargaining chips" for the benefit of American citizens. Brief of American Civil Liberties Union, *Amicus Curiae*, p. 18, n.3 (November 1974).

Naturally, petitioners have offered no proof in support of this contention,[32] nor any indication of how many of the nearly three million jobs in the federal government involve positions concerning "loyalty," "national security," or exercise of the national sovereignty. As the lower appellate court accurately stated:

> We have no doubt that under certain circumstances our government may, for loyalty and security reasons, properly require citizenship for certain government positions. But the Commission regulations fail to delineate any specific positions where security, loyalty, and policy-making require that the citizenship requirement be essential for employment. *Wong v. Hampton, supra*, 500 F.2d at 1040.

[32]The absence of such proof is not surprising. Personal loyalty or allegiance is not the monopoly of citizens:

> Loyalty and the desire to work for the welfare of the [government], in short, are individual rather than group characteristics. An . . . alien may or may not be loyal; he may or may not wish to work for the success and welfare of the state or nation. But the same can be said of a . . . natural born citizen. *Oyama v. California*, 332 U.S. 633, 666 (1948) (concurring opinion).

Naturally, there are more logical–let alone effective–means of ensuring loyalty in the federal competitive service than the blanket exclusion of all non-citizens. Currently, in regard to native-born and naturalized citizens, the government conducts background investigations to the extent required by the nature of each particular job (A. 19). Each year, petitioners spend tens of millions of dollars and employ thousands of individuals to conduct such background investigations. *E.g.*, Hearings, Appropriations for 1971, Subcommittee on Independent Offices and the Department of Housing and Urban Development, Part 1, pp. 194, 269 (U.S. Civil Service Commission 1970).

Rather than delineate those special cases where "security risks" may be involved,[33] the federal

[33]Petitioners suggest that "problems of administrative convenience" justify the lack of such delineation (Pet. Br. 69).

> The problem of differentiating among jobs, among facilities, and, indeed, among different categories of aliens, is so large and intricate . . . that the courts ought not to thrust that task upon the Executive . . . (*ibid.*).

Initially, it must be emphasized that "administrative convenience" is "insufficient to make valid what otherwise is a violation of due process of law." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 (1974). As this Court recently recognized:

> [A]lthough efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. *Frontiero v. Richardson*, 411 U.S. 677, 681 (1973) (citations omitted).

To allow "administrative convenience" to serve as a compelling government interest would completely undermine the special protection which the Constitution and this Court have carved out for resident aliens.

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very *dangerous doctrine* and if allowed to flourish would *destroy the benefit of a written Constitution* and undermine the basis of our Government. *Reid v. Covert*, 354 U.S. 1, 14 (1957) (emphasis added).

Moreover, the argument of administrative convenience lacks factual as well as legal support. The overwhelming majority of the nearly three million positions in the federal service do not

regulation automatically excludes all aliens from the competitive civil service. Instead of identifying those positions where broad policy decisions may properly require the office-holder to be a citizen, petitioners toss a complete blanket over federal employment opportunities for aliens.[34]

The vice of such a blanket exclusion, as in the *Sugarman* case, is its overbreadth, of a regulation

involve policy-making, nor do they touch on national security. Like employees in other public and private sectors, most federal employees "work for a living in the common occupations of the community." *Truax v. Raich*, 239 U.S. 33, 41 (1915). In fact, the recent action of the United States Postal Service demonstrates the utter lack of any relationship between citizenship and the ability to perform most of the positions in federal employment. Except for certain "sensitive" positions, the Postal Service has now "adopted a policy of considering permanent resident aliens for appointment to Postal Service positions . . . on the *same basis* that it considers individuals who are U.S. citizens for appointments." United States Postal Service, Personnel Handbook, P-11, § 317.3 (emphasis added) (reported in Postal Bulletin, No. 20980, p. 2 (May 2, 1974)). This regulation also demonstrates that lines can easily be drawn to specify the particular positions for which citizenship may be required.

[34]Petitioners' argument of "security risks" and "loyalty" has a reverse twist in actual practice. While resident aliens are foreclosed from seeking all competitive civil service positions, even petitioners recognize a number of statutory exceptions to the ban on employment of aliens (Pet. Br. 84, n.72). Significantly, all employment in the Department of Defense, the Atomic Energy Commission, and the National Aeronautics and Space Administration—which all involve sensitive positions requiring the highest degree of loyalty—are fully open to aliens (*ibid.*). Similarly, even petitioners' own regulations recognize that resident aliens may be given "a limited executive assignment . . . in the absence of qualified citizens" or other "appointment[s] in rare cases." 5 C.F.R. §338.101 (b). Furthermore, positions in the highest levels of the executive branch—and

"biting off" too much of the Constitution. *E.g., Sugarman v. Dougall, supra*, 413 U.S. at 642-643; *Wong v. Hampton, supra*, 500 F.2d at 1040. No effort has been made by petitioners to bar "some or all aliens from closely defined and limited classes of public employment on a uniform and consistent basis." *Sugarman v. Dougall, supra*, 413 U.S. at 639. In analogous situations, this Court has struck down discriminatory laws because "less onerous" alternatives were available to promote the governmental interest. *E.g., Bullock v. Carter*, 405 U.S. 134 (1972); *Carrington v. Rash*, 380 U.S. 89 (1965); *Sherbert v. Verner*, 374 U.S. 398 (1963). Similarly, in the instant case, the balloon of national security and loyalty cannot possibly be inflated sufficiently to ban *all* resident aliens from *all* positions in the federal civil service.[35]

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those of a "confidential or policy determining character"–constitute an "excepted service" which is exempt from the exclusionary civil service regulation. See, *e.g.*, 5 C.F.R. §§213.3101 - .3394.

A similar incongruous duality confronted this Court in *Sugarman v. Dougall*, where New York's alienage exclusion did not apply to three job categories in the classified service, including the "higher offices" in the state executive department. 413 U.S. at 639. As this Court recognized, the "asserted justification proves both too much and too little." *Id.* at 642.

[35]Even under the "rational basis" test, the exclusion of all resident aliens from all federal employment would be violative of due process of law since it creates a conclusive presumption that all aliens–by virtue of that status alone–are unqualified for all federal employment. See, *e.g., Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 411 (1973). "[Laws] creating permanent irrebutable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments." *Vlandis v. Kline, supra*, 412 at 416.

Petitioners have thus failed not only to satisfy the strict requirement of demonstrating that the discrimination against respondents is necessary to promote a compelling governmental interest. They have also offered "justifications" which camouflage the real basis for exclusion. When all is said and done, petitioners advance no compelling justification because there is none. The only "justification" that exists for the total exclusion of resident aliens from the competitive federal civil service is that respondents are aliens. To state that would confess discrimination; hence, petitioners are silent.

II.

NEITHER THE "PLENARY POWER" OF THE FEDERAL GOVERNMENT NOR THE CONCEPT OF "PRIVILEGES AND IMMUNITIES" IMMUNIZES PETITIONERS FROM SATISFYING THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

As the preceding section demonstrated, it "would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" (*Bolling v. Sharpe, supra*, 347 U.S. at 500) than upon the states with respect to discrimination against resident aliens in public employment. Yet, petitioners earnestly devote a substantial part of their brief to the argument that the Constitution imposes *no* duties on them in this area.

Our primary submission is that the decision to limit employment of noncitizens in the federal

> competitive civil service is . . . a matter beyond the reach of the equal protection principle [in the Due Process Clause of the Fifth Amendment] (Pet. Br. 24-25).

Essentially, petitioners suggest that the federal government is somehow exempt from the limitations of the Fifth Amendment because of "its plenary power over immigration and naturalization" (Pet. Br. 42) and because the Privileges and Immunities Clause of the Fourteenth Amendment "authorizes preferred treatment for citizens" (Pet. Br. 28). The following will demonstrate that such arguments are baseless and merely evoke now discredited judicial distinctions.

A. The Broad Federal Powers Over Immigration and Naturalization Do Not Permit Either Congress or Petitioners to Avoid the Constitutional Limitations of the Fifth Amendment.

Petitioners submit that the plenary power of Congress over immigration and naturalization, combined with the residue of powers given the President and Congress over national defense and foreign relations, remove their discriminatory regulation both from constitutional requirements and judicial review (Pet. Br. 24-25, 42-50). The power to regulate resident aliens, petitioners assert, is so absolute that the judiciary is required to acknowledge and accept all acts of Congress touching upon or affecting the lives of aliens. All such actions thus become immune from constitutional inquiry, regardless of how irrational, how invidious – or how unrelated to issues of immigration, naturalization, deportation, or national sovereignty.

The error in petitioners' reasoning is patent. The assertion that Congress has "plenary" powers over a given area does not mean that petitioners can ignore the Constitution – and judicial standards enforcing the Constitution – in implementing those powers.[36] To the contrary, Congress' power over resident aliens, like all powers in this system of government, is subject to constitutional limits which must be respected and enforced by the courts. As the lower court observed:

> To state that Congress' plenary power over aliens enables the federal government to unreasonably discriminate against aliens, neglects to consider the fact that even Congressional plenary power is subject to Constitutional limits. *Wong v. Hampton, supra*, 500 F.2d at 1036.

While an exhaustive review of decisions is not necessary to demonstrate the validity of this statement, some examples of this Court's treatment of other plenary powers will reveal the total fallaciousness of petitioners' contention.

The plenary power relied upon by petitioners primarily stems from Article I of the Constitution, which vests in Congress the power to establish uniform rules of naturalization. U.S. Const. Art. I, Sec. 8, cl. 4. Yet, this Court's treatment of other enumerated powers in Article I destroys any claim of unfettered authority advanced by petitioners. In the area of Congress' power to conduct war and raise armies, this Court has not hesitated to strike down arbitrary classifications and

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[36] Since petitioners readily admit that an alien "is, of course, a 'person' within the meaning of the Fifth Amendment" (Pet. Br. 27), their contention that Congress' plenary power exempts them from the Fifth Amendment becomes even more difficult to fathom.

exercises of Congressional power. "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."[37] Instead, this Court has pierced the notion that all Congressional actions pursuant to the plenary power to conduct war and raise armies are immune from constitutional attack.

> [T]he phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit. . . . When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our "delicate and difficult task" to determine whether the resulting restriction on freedom can be tolerated.[38]

Similarly, these same constitutional limitations constrain the President when acting under his authority as

[37] *United States v. Robel*, 389 U.S. 258, 264 (1967); *Bowles v. Willingham*, 321 U.S. 503, 521 (1944); *Home Bldg. & Loan Ass'n. v. Blaisdall*, 290 U.S. 398, 426 (1934).

[38] *United States v. Robel, supra*, 389 U.S. at 263-264. *See also, e.g., United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-22 (1955) (plenary powers under Article I do not "empower Congress to deprive people of trials under Bill of Rights safeguards"); *United States v. Cohen Grocery Co.*, 255 U.S. 81, 88 (1921) ("the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth and Sixth Amendments"); *Hamilton v. Kentucky Dist. & Warehouse Co.*, 251 U.S. 146, 155 (1919); *United States v. Russell*, 13 Wall. 623, 627 (1871); *Ex parte Milligan*, 4 Wall. 2 (1866).

In fact, this Court recently overturned Congressional legislation—stemming from the recognized federal plenary power over the armed forces—as violative of the equal protection principles in the Due Process Clause of the Fifth Amendment. *Frontiero v. Richardson*, 411 U.S. 677 (1973). See note 13, *supra*.

Commander in Chief[39] and the Congress when acting in areas of national security and foreign relations.

> [T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal.[40]

[39] *E.g., Ex parte Quinn*, 317 U.S. 1, 25 (1942) (exercise of plenary power by the President reviewable "for conflict with the Constitution or laws of Congress constitutionally enacted").

[40] *United States v. Robel*, 389 U.S. 258, 264 (1967). *See also Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kiiskila v. Nichols*, 433 F.2d 745 (7th Cir. 1970); *United States v. Garrity*, 433 F.2d 649 (8th Cir. 1970).

Despite this unanimity of authority, petitioners nevertheless suggest still another "plenary power"—the treaty power—enables them to deprive both resident aliens and citizens alike of their constitutional rights.

> Thus, no treaty could be challenged on the ground that it discriminates against one group of foreign nationals resident here, or against citizens (Pet. Br. 24).

Once again, petitioners have misstated the law. Even the classic formulation of the treaty power announced by this Court in *Missouri v. Holland* does not sanction treaties which flout the United States Constitution. 252 U.S. 416 (1920). In that case, this Court upheld the treaty precisely because it did "not contravene any prohibitory words to be found in the Constitution." *Id.* at 434. Nearly four decades later, this Court reaffirmed its analysis in *Missouri v. Holland*, and held that an agreement with a foreign nation could not achieve what the Constitution forbids.

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. *In effect, such construction would permit amendment of that document in a manner*

Nor can the Congress and the President combine their authority over national security and foreign affairs to act as they choose (Pet. Br. 46-48). Though Congress does accord the executive branch power to act,

> [t]his does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice.[41]

The strict application of constitutional guarantees is not simply limited to those plenary powers relating to war, the military, or national defense. In a host of other areas where recognized plenary powers are involved, this Court has not hesitated to ensure that constitutional guarantees be met. Whether it be Congressional legislation concerning the District of

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not sanctioned by [the Constitution]. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined .... *Reid v. Covert*, 354 U.S. 1, 17 (1957) (emphasis added).

[41] *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). See also *Afroyim v. Rusk*, where this Court denied Congress the power to frustrate the Constitution by depriving a person of his citizenship by

> simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted. 382 U.S. 253, 263 (1967).

Columbia,[42] the United States Postal Service,[43] or even

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[42] As early as 1899, this Court recognized that Congress' plenary power over the District of Columbia afforded no license to legislate for that area in a manner which ran roughshod over the Constitution. *Capitol Tractor Co. v. Hof*, 174 U.S. 1 (1899). Though Congress may surely exercise its plenary power over the District of Columbia, it may do so only "so long as it does not contravene any provision of the Constitution of the United States." *Id.* at 5 (citations omitted).

Since *Capitol Tractor*, a consistent line of cases has reaffirmed that Congress' powers over the District of Columbia are subject to constitutional limits. *E.g., Shapiro v. Thompson*, 394 U.S. 613 (1969); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Hurd v. Hodge*, 334 U.S. 24 (1948); *O'Donoghue v. United States*, 289 U.S. 516, 529 (1933); *Atlantic Cleaners & Dryers v. United States*, 286 U.S. 427, 434-435 (1932); *see also United States v. Thompson*, 452 F.2d 1333, 1338 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972). Petitioners clearly misread the thrust of these cases when they suggest "a congressional appropriation in favor of residents of the District of Columbia ... [could not] be attacked as denying equal treatment to other citizens of the United States" (Pet. Br. 24). The reason such an appropriation might withstand judicial scrutiny has nothing to do with Congress' plenary powers over the District of Columbia. Rather, it would be upheld only so long as such law did not infringe on a recognized fundamental right, did not discriminate against a suspect class, and was premised on a rational basis.

Significantly, this Court's decision in *Bolling v. Sharpe* did not hesitate to strike down, as violative of the Fifth Amendment, discrimination practiced in the very District of Columbia over which Congress had plenary power. Moreover, as with the employment opportunities sought by resident aliens in this case, *Bolling* involved a "suspect" classification but not a substantive matter—educational opportunities—which is a "fundamental" right. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29-39 (1973). Nevertheless, the combination of plenary power and a non-fundamental right posed no barrier to this Court in holding the discriminatory restrictions to be unconstitutional.

[43] *E.g., Lamont v. Postmaster General of the United States*, 381 U.S. 301 (1965).

bankruptcy,[44] this Court has never permitted the invocation of a "talismanic incantation" to blur the mandate of the Constitution.[45]

It is hardly surprising that petitioners have failed to explain why the plenary power conferred by the Constitution over immigration and naturalization should be viewed any differently from other plenary powers over the armed forces, war, foreign affairs, or the like. As with these other powers, Congress is not free to ignore the Constitution. There is no dispute that Congress may deny entry to aliens as it chooses and may dictate the terms upon which an alien may become a naturalized citizen. Yet, as this Court has consistently recognized, the mere existence of these powers over immigration and naturalization does not permit Congress to deny resident aliens rights guaranteed by the Constitution.[46] Recently, this Court stated that "we

[44] *E.g., United States v. Kras*, 409 U.S. 434 (1973).

[45] Petitioner's proposition naturally leads to a series of absurd, inconsistent, and clearly unconstitutional results. For example, since Congress has complete "plenary" powers over the Armed Forces, the argument advanced by petitioners would suggest Congress could discriminate against non-whites in this area. Similarly, given Congress' complete power over federal elections and federal criminal actions, the implication of petitioners' contention is that the judiciary must ignore claims of discrimination in these vast arenas. Though respondents will not belabor the vast potential of hypotheticals, the numerous decisions of this Court clearly belie such possibilities.

[46] In carving out special judicial protection for resident aliens, this Court in *Graham v. Richardson* observed:

> Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause. 403 U.S. 365, 382 (1971).

Similarly, Congress itself cannot authorize its own violation of the equal protection guarantees of the Fifth Amendment.

extend to such [lawful permanent resident] aliens *the same constitutional protection* of due process that we accord citizens." *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 309 (1970) (emphasis added). This decision reaffirmed that

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and the due process clause of the Fourteenth Amendment. *None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority.* (Emphasis added)[47]

[47] *Hellenic Lines Limited v. Rhoditis, supra*, 398 U.S. at 309, n.5 (emphasis added), citing *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (concurring opinion). See also *Abel v. United States*, 362 U.S. 217 (1960); *Heikkinen v. United States*, 355 U.S. 273 (1958); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953); *United States v. Spector*, 343 U.S. 169 (1952); *Bridges v. California*, 314 U.S. 252 (1941); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931); *Wing Wong v. United States*, 163 U.S. 228 (1886). As the late distinguished constitutional authority Alexander Bickel observed in this context:

> The original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen. Bickel, "Citizenship in the American Constitution," 15 *Ariz. L. Rev.* 369, 370 (1973).

Significantly, not only have petitioners ignored the strict application of the United States Constitution to so-called plenary powers, but they have also failed to recognize that the plenary powers doctrine does not even apply to the facts of this case. All the cases in which this Court has discussed such powers – including those cited by petitioners (Pet. Br. 42-43)[48] – dealt

[48]Petitioners place much reliance on this Court's decision in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1951) (Pet. Br. 43). In that case, this Court was concerned with the deportation of a Communist who chose not to become a citizen. The context of the case was "congressional alarm about a coalition of Communist power without and Communist conspiracy within the United States." 342 U.S. at 590. Nevertheless, this Court dealt with "the constitutional objections' under the applicable standards. *Id.* at 596. Similarly, the other cases relied on by petitioners (Pet. Br. 42-43) focused only on Congress' power to control the entry of aliens (*e.g., Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Boutilier v. Immigration Service*, 387 U.S. 118 (1967); *Chinese Exclusion Case*, 130 U.S. 581 (1889)) or to deport aliens (*e.g., Flemming v. Nestor*, 363 U.S. 603 (1960); *Galvan v. Press*, 347 U.S. 522 (1954); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

Since these cases were limited to issues of entry and deportation, none dealt with Congress' power over aliens in other contexts, especially discrimination against resident aliens in employment opportunities. The rationale for some measure of judicial deference in the areas of entry and deportation simply cannot be engrafted onto the instant case. See also Gordon & Rosenfield, *Immigration Law and Procedure*, § 1.5(a) (1974 rev. ed.) (the plenary power over immigration and naturalization "extends only to determining classes of aliens subject to exclusion and expulsion").

Finally, petitioners fail to recognize that, in the very cases cited for the proposition that Fifth Amendment restrictions do not apply to plenary powers, this Court *in fact* applied the Fifth Amendment in assessing the legality of the federal conduct. *E.g., Flemming v. Nestor, supra*, 363 U.S. at 611.

solely with matters of entry, deportation, and foreign relations. In those situations, issues of foreign affairs, national security, and sovereignty are manifestly fused.

> That aliens remain vulnerable to *expulsion* after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state.[49]

As the appellate court below found, the paramount issues of this country's sovereignty and security are not present in the instant case.[50] *Wong v. Hampton, supra,*

[49]*Harisiades v. Shaughnessy*, 342 U.S. 580, 587-588 (1951) (emphasis added).

[50]Naturally, to the extent that the employment of non-citizens would involve these issues, both this Court in *Sugarman* and the appellate court below recognized that aliens might be constitutionally excluded from such positions. In *Sugarman*, this Court expressly noted that citizenship might be valid "for officers who participate directly in the formulation, execution, or review of broad public policy." *Sugarman v. Dougall, supra*, 413 U.S. at 647. Similarly, the court below equally recognized that "under certain circumstances our government may, for loyalty and security reasons, properly require citizenship for certain government positions." *Wong v. Hampton, supra*, 500 F.2d at 1040. Yet, as both decisions found, the exclusion of all resident aliens from all government positions surely does not bear on "the conduct of foreign affairs, the war power, or the maintenance of a republican form of government." *Harisiades v. Shaughnessy, supra*, 342 U.S. at 588-589. Instead, pursuant to judicial protections against overbreadth, the government must "delineate any specific positions where security, loyalty, and policy-making require that the citizenship requirements be essential for employment." *Wong v. Hampton, supra*, 500 F.2d at 1040.

500 F.2d at 1040. Rather, respondents merely seek the opportunity to apply to and work for the federal government in any position where their skills could be utilized. The factors which give Congress latitude in questions of entry and deportation[51] are simply not germane – analytically or pragmatically – to a resident alien's employment goals. Thus, Congress' exercise of "plenary powers" in areas of foreign affairs or the entry and deportation of aliens is not only tempered by constitutional requirements, but is irrelevant to the instant case.

Finally, petitioners suggest that the plenary power of Congress over immigration and naturalization gives rise to a "political" question which is effectively insulated from judicial review (Pet. Br. 48-50). They contend that federal "policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government" (Pet. Br. 48). Yet,

[51]The cautious judicial attitude toward the exercise of Congress' power to deport aliens from the United States seems further to stem from the fact that the Constitution specifically gives Congress power to establish uniform rules of naturalization (Art. I, Sec. 8), a power which inherently encompasses both immigration and deportation. *E.g., Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889). On the other hand, there is no Constitutional recognition–let alone direction or compulsion–concerning the area of federal government employment. Moreover, such caution may also recognize that decisions relating to deportation inherently require that classifications be made among and between aliens–and often the "suspect" class of resident aliens. Naturally, there is nothing inherent in the selection of employees for the federal government which requires classifications be made between resident aliens and citizens.

in the case petitioners cite for this proposition (*Galvan v. Press*), this Court in the very next sentence following petitioners' quotation said:

> In the enforcement of these policies, the Executive Branch of the Government must respect the . . . safeguards of due process. 347 U.S. 522, 531 (1974).[52]

Clearly, this Court no longer tolerates the possible spectre of "political" issues as an automatic immunization from judicial interference. Simply because any policy toward aliens may tangentially relate to, or affect, political questions inherent in foreign relations is not reason enough to preclude judicial review of such a totally exclusionary rule. Under the political question doctrine formulated by this Court, it is the "responsibility of this Court as ultimate interpreter of the Constitution" to decide issues of justiciability. *Baker v. Carr*, 369 U.S. 186, 211 (1962). As this Court stated in that case,

> it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. *Ibid.*

Similarly, given this Court's stringent protective review in the past (*supra* at pp. 14-20) and its special solicitude for

[52]The *Galvan* case, as did the others cited by petitioners (Pet. Br. 48-49), involved the applicability of due process to deportation proceedings. As respondents recognize, this Court has been reluctant to impose limitations on the substantive grounds for which an alien can be deported (*supra* at pp. 38, 40). Yet, once an alien has been admitted to this country for permanent residence, and so long as he has not been deported, he is entitled to "the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen." *Galvan v. Press, supra*, 347 U.S. at 530.

the rights of resident aliens, it would be both erroneous and incongruous to remove petitioners' discriminatory conduct from the protective scope of the Fifth Amendment.

In essence, petitioners have confused "plenary" power with absolute and unrestricted power, positing a premise which is both judicially unsupportable and operatively pernicious. Just as "[t]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power,"[53] nor can the "talismanic incantation" of "political question" operate to preclude judicial protection of constitutional rights.[54] Nor can the phrase "plenary power over immigration and naturalization" (Pet. Br. 42) render constitutional the discrimination practiced by the federal government against resident aliens.

> With its plenary power, Congress can prevent or limit the number of aliens entering the country, and thus, can decrease or eliminate the problem raised in this case. But once legally within our country's borders, there are constitutional limitations as to how aliens can be treated by the government, vis-a-vis citizens of this country. *Wong v. Hampton, supra,* 500 F.2d at 1036, n.10a.

As the appellate court found – and as this Brief has shown – petitioners have grossly exceeded those constitutional limitations.

[53] *United States v. Robel*, 389 U.S. 258, 263 (1967).

[54] See *e.g., Powell v. McCormack*, 395 U.S. 486 (1969).

B. Since Employment in the Federal Civil Service Is Not a "Privilege" of National Citizenship, the Privileges and Immunities Clause Cannot Justify the Total Exclusion of Resident Aliens from All Government Employment.

Petitioners offer one more detour to avoid the clear path of protection guaranteed by the Due Process Clause of the Fifth Amendment. They contend that employment in the federal civil service is a "privilege of national citizenship" which can be denied to resident aliens without any regard to the requirements of the Fifth Amendment (Pet. Br. 28-42). In support of this rather novel argument, petitioners employ a sophistic line of reasoning and a careless disregard of history. Their argument, however, not only misconstrues the purposes of the Privileges and Immunities Clause, but amounts merely to "old wine in new bottles." As this subsection of respondents' Brief will show, such an argument is simply the invocation of the now discredited "right-privilege" dichotomy which this Court has openly "rejected"[55] in measuring the scope of protected constitutional rights.

The Privileges and Immunities Clause in the Fourteenth Amendment was adopted to prohibit the states from denying individuals of African descent the privileges and immunities of national citizenship. Over the years, the clause has been consistently interpreted as an explicit constitutional recognition of the federal-

[55] *E.g., Sugarman v. Dougall, supra*, 413 U.S. at 644; *Graham v. Richardson, supra*, 403 U.S. at 374; *Shapiro v. Thompson*, 394 U.S. 618, 627, n.6 (1969).

ism concept on which this system of government is based. Yet, the clause did not "radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people." *McPherson v. Blacker*, 146 U.S. 1, 39 (1892). Instead, it simply recognized

> [t]here is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.[56]

As both the language of the clause and the interpretations of this Court demonstrate, nothing in the Privileges and Immunities Clause extended the authority of the federal government. The clause was adopted to restrict state discrimination, not to authorize federal discrimination. Nothing in the clause exempts the federal government from the strictures of the Fifth Amendment nor authorizes it to deny resident aliens rights accorded by that amendment.

> [T]he privileges and immunities of a citizen of a state . . . were not intended to have any additional protection [by the clause] . . . . They must rest for their security and protection where they have heretofore rested.[57]

[56] *Slaughter-House Cases*, 16 Wall. 36, 74 (1873); *McPherson v. Blacker, supra.*

[57] *Maxwell v. Dow*, 176 U.S. 581, 587-588 (1900). *See also Madden v. Kentucky*, 309 U.S. 83 (1940); *Twining v. New Jersey*, 211 U.S. 78 (1908); *McPherson v. Blacker, supra; In re Kemmler*, 136 U.S. 436 (1890); *United States v. Cruikshank*, 94 U.S. 542, 549 (1875). As this Court has uniformly held, "protection to life, liberty, and property rests primarily with the states" (*In re Kemmler, supra*, 136 U.S. at 448), as do "those fundamental civil rights for the security and establishment of which organized society was instituted" (*McPherson v. Blacker, supra*, 146 U.S. at 37).

It is thus firmly established that the Privileges and Immunities Clause could not – and did not – "attempt to confer any new privileges or immunities upon citizens." *Twining v. New Jersey, supra*, 211 U.S. at 95.[58] Contrary to petitioners' assertion, the clause gave no power to Congress to create or isolate rights appertaining to national citizenship for the express purpose of denying those rights, by legislation or otherwise, to non-citizens. Rather, the clause was no more than an explicit constitutional recognition of a power that Congress already and always possessed:

> [I]t was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied, no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and laws of the United States always controlled any state legislation of that character. *Twining v. New Jersey, supra*, 211 U.S. at 95.

With judicial expansion of the due process and equal protection components of the Fourteenth Amendment, the Privileges and Immunities Clause has become virtually a dead letter in the Constitution.[59] This Court

[58] *See also, e.g., Hague v. C.I.O.*, 307 U.S. 496, 512 (1939); *Minor v. Happersett*, 21 Wall. 162 (1874).

[59] As one commentator observed:

> Unique among constitutional provisions, the privileges and immunities clause of the Fourteenth Amendment enjoys the distinction of having been rendered a "practical nullity" by a single decision of the Supreme Court [*Slaughter-House Cases*] rendered within five years after its ratification. 1 Schwartz, *Statutory History of the United States*, 334 (1970).

has not employed the clause as a means to invalidate state laws.[60] Nor has it expanded the narrow list of "privileges and immunities of citizens of the United States." Indeed, this Court has held that most of our basic rights and liberties fall outside the scope of the clause.[61]

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[60]Even this Court's decision in *Colgate v. Harvey*, 296 U.S. 404 (1935), was explicitly overruled in *Madden v. Kentucky*, *supra*.

[61]In fact, this Court has held that the entire Bill of Rights falls outside the scope of the clause. *Twining v. New Jersey*, *supra*; *Madden v. Kentucky*, *supra*. Thus, among those cherished rights not covered by the Privileges and Immunities Clause are First Amendment protections of free speech and assembly (*Hague v. C.I.O.*, *supra*), Fifth Amendment self-incrimination protections (*Twining v. New Jersey*, *supra*), Fifth Amendment double jeopardy protections (*Palko v. Connecticut*, 302 U.S. 319 (1937)), Sixth Amendment jury trial protections (*Walker v. Sauvinet*, 92 U.S. 90 (1875)), and Eighth Amendment protections against cruel and unusual punishment (*In re Kemmler*, 136 U.S. 436 (1890)).

As far as employment-related rights are concerned, this Court recently stated that "the right to practice law is not a 'privilege or immunity' within the meaning of the Fourteenth Amendment." *In re Griffiths*, 413 U.S. 717, 719, n.4 (1973). This statement reaffirms that the Privileges and Immunities Clause provides no protection for the right to engage in business in general (*Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907); *Holden v. Hardy*, 169 U.S. 366 (1898)), to engage in any of the state-regulated occupations (*Crowley v. Christiansen*, 137 U.S. 86 (1890); *Bradwell v. Illinois*, 83 U.S. 130 (1872)), nor even to acquire, own, or receive income from out-of-state investments (*Madden v. Kentucky*, *supra*).

As for those personal entitlements found to be within the Privileges and Immunities Clause,[62] they are essentially protective of the political and individual rights of previously oppressed individuals. Most relate to a young nation's attempt to establish and preserve its

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[62]Petitioners offer a "comprehensive list" of such privileges and immunities at pp. 37-38, n.26 of their brief. Significantly, their "list" derives from a 1904 lower federal court decision which *rejected* the contention that the right to unionize was a privilege and immunity of citizenship. *United States v. Moore*, 129 Fed. 630 (C.C.N.D. Ala. 1904). The passage from *Moore* which petitioners quote was written "to show how entirely different [privileges and immunities] are in origin and nature from rights involved in this case." *Id* at 633. Moreover, contrary to petitioners' intimation (Pet. Br. 37, n.26), the *Moore* case was subsequently cited in *United States v. Guest*, 383 U.S. 745, 759 (1966), for the proposition that the right to interstate travel is a federal right protected by 18 U.S.C. § 241, not the Privileges and Immunities Clause.

In any event, substantial doubt exists today whether the Privileges and Immunities Clause secures many of these entitlements. For example, though the privilege of the writ of habeas corpus is listed as a privilege and immunity of national citizenship (Pet. Br. 37, n.26), it is today guaranteed by the Constitution without regard to citizenship. Similarly, while the rights to free expression, peaceful assembly, and interstate travel are also listed as privileges and immunities of citizenship, the decisions of this Court have made clear they are rights common to all persons. See note 61, *supra*. Indeed, this Court has directly recognized that rights enjoyed by all persons are, *ipso facto*, not privileges or immunities of national citizenship. Such rights

> are not distinctly privileges or immunities of such citizenship, where everyone has the same as against the federal government whether citizen or not. *Maxwell v. Dow*, *supra*, 176 U.S. at 595-596.

national sovereignty. The right to travel between the states was necessary to avoid Balkanization and the break up of this nation into separate enclaves. Protection for those who asserted federal rights was aimed at preserving loyalties of citizens to the federal as well as state governments. The interests protected were basically civil rights that related directly to issues of national sovereignty.

Clearly, the "right" to federal employment is totally lacking in those political and national sovereignty characteristics which are common to the few interests deemed to be privileges and immunities of national citizenship.[63] More importantly, while the Privileges and Immunities Clause does secure certain rights, it does not sanction the Congress to declare that federal employment is among those rights. Even petitioners admit "that no branch of government can expand or contract the substantive content of the Privileges and Immunities Clause" (Pet. Br. 39). Yet, they ignore their own admission by suggesting that – simply because the Congress has restricted federal employment to citizens – federal employment is thus a privilege and immunity of citizenship. The circularity of such reasoning is astounding. No matter how ancient a Congressional policy may be, it cannot be automatically transformed

[63]Since the Privileges and Immunities Clause is concerned with state infringement on those interests necessarily relating to national citizenship, it is even further evident that federal employment is not such a right. Not even petitioners suggest there is any possibility that states may threaten to infringe upon any individual's application for federal employment. The absence of such danger not only obviates any need for Congress to protect individuals from state action, but removes federal employment from the essential purpose underlying the clause.

into a constitutional right. If the denial of federal employment to respondents offends the Due Process Clause of the Fifth Amendment, no amount of Congressional sanction can remove the infirmity.[64]

Finally, even if, *arguendo*, federal employment were covered within the Privileges and Immunities Clause, it

[64]Petitioners employ a novel bootstrap argument in attempting to elevate federal employment to the level of a privilege and immunity. They argue that since "the right to elect federal officers is deemed a privilege of national citizenship . . . [*a*] *fortiori* . . . the more direct participation in government [through federal employment] ought to be so characterized" (Pet. Br. 38). Such a leap in logic is by no means clear. But, even if the one followed logically from the other, the initial premise–that the right to vote for federal officials is a privilege and immunity of citizenship–contravenes explicit decisions of this Court. As early as 1874, this Court held that the right to vote was not a privilege and immunity guaranteed against state infringement. *Minor v. Happersett*, 21 Wall. 162 (1874). Naturally, though "the right of suffrage is not a necessary attribute of citizenship" (*United States v. Cruikshank, supra*, 92 U.S. at 555-556), there is no dispute today that the right to vote is constitutionally based and, as such, can be protected through Congressional legislation. But it is a right secured by the Constitution, not by the privileges and immunities of citizenship. *E.g., Smith v. Allright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941).

Finally, petitioners suggest Congressional legislation in the 1860s and 1870s demonstrates that the Privileges and Immunities Clause applies to federal employment (Pet. Br. 30-33). Yet, this legislation reflected a use of the clause which this Court has consistently rejected during the past 100 years (*supra* at pp. 46-50). Such legislation was also adopted at a time when the constitutional guarantees of due process and equal protection were accorded a relatively narrow scope. *E.g., Civil Rights Cases*, 109 U.S. 3 (1883). Since the range of constitutional protections has grown dramatically during the past century, it is indeed anomalous to justify present constitutional violations by utilizing historically abandoned standards.

could still not be denied to non-citizens under the clause. The purpose of the Privileges and Immunities Clause was to guarantee, not deny, rights. As petitioners readily concede, the framers of the clause never even thought about – let alone dealt with – resident aliens (Pet. Br. 30). Instead, they were solely concerned with establishing civil rights for a class of previously oppressed individuals. Until now, no one has ever suggested that the interests guaranteed by the clause were not universally shared by all individuals. It is hardly surprising that none of the myriad cases cited by petitioners (Pet. Br. 28-42) reflects any intent – explicit or otherwise – to deny aliens the protection of those rights.

Petitioners' contention stems from a method of interpretation which belies historical as well as logical foundation. Since the Privileges and Immunities Clause is silent as to non-citizens, petitioners infer that the interests guaranteed by the clause must not extend to such non-citizens. Yet, as petitioners readily admit, the constitutional protections now accorded aliens did not exist at the time of the clause's passage. Similarly, equal protection constraints on the federal government had not been fully developed at that time. Thus, the fact that "[i]t never occurred to these contemporaries of the Fourteenth Amendment" (Pet. Br. 30) to include aliens demonstrates not conscious exclusion of non-citizens, but merely conscious concern for citizens. What petitoners have done it to mix the different standards of two distinct centuries to reach an unwarranted and unjustifiable conclusion.

In attempting to resurrect the Privileges and Immunities Clause as a limitation on resident aliens,

petitioners are really seeking to have "constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'." *Sugarman v. Dougall, supra*, 413 U.S. at 644; *Graham v. Richardson, supra*, 403 U.S. at 374. Fortunately, this Court no longer tolerates such ancient and unwarranted distinctions. Similarly, the tortured history and limited application of the Privileges and Immunities Clause teach that its provisions will no longer shield the individual from any but the most narrowly defined actions of the states. For petitoners to now use the clause as a means of shielding their own actions from the requirements of the Fifth Amendment twists the clause from its constitutional moorings and totally distorts its narrow purpose. Both history and a uniform line of cases in this Court require the strongest rejection of petitioners' highly unorthodox use of this clause.

III.

PETITIONERS' REGULATION WHICH EXCLUDES NON-CITIZENS FROM ANY FEDERAL EMPLOYMENT IS UNAUTHORIZED BY EITHER CONGRESS OR THE PRESIDENT, AND CONTRAVENES TWO EXECUTIVE ORDERS.

As Section I of this Brief has clearly demonstrated (*supra*), the federal regulation excluding all resident aliens from employment opportunities in the federal civil service system violates the Fifth Amendment to the United States Constitution. Yet, this regulation also suffers fatally from patent non-constitutional defects.

While petitioners have been given discretion to issue regulations establishing standards for admission into the civil service, their discretion must be exercised in accordance with – and cannot exceed or conflict with – the authority granted to them by either the Congress or the President. As this section of respondents' Brief will show, there is no explicit Congressional or Presidential authorization which sanctions petitioners' blanket discrimination against the employment of permanent resident aliens in the federal government; to the contrary, two executive orders directly forbid such discrimination. The absence of such explicit authorization and the contravention of two Presidential mandates constitute further reasons why the discriminatory civil service commission regulation, 5 C.F.R. §338.101, must be rendered invalid.

A. Neither Congress nor the President Has Authorized the Civil Service Commission Automatically to Foreclose Resident Aliens From the Federal Competitive Civil Service.

1. Explicit Authorization Must Be Found When Administrative Actions Affect Important Individual Rights.

An administrative agency receives only as much authority as is properly delegated to it. From this maxim flows the well-established rule that an administrative agency may never exceed, alter, or conflict with the laws from which its powers stem. *E.g., Vitarelli v. Seaton*, 359 U.S. 535 (1959); 3 Davis, *Administrative Law Treatise*, §§27.01, *et seq.* (1970). As applied to the instant matter, this rule requires that the United

States Civil Service Commission not exercise authority which has not been granted to it by either the United States Congress or the President of the United States.

In determining whether administrative agencies act within the ambit of their authority, courts generally accord these agencies a presumption of regularity. Yet such a deferential judicial attitude toward administrative interpretation does not apply when the actions of these agencies affect important and sensitive individual rights. Rather than to presume any regularity in such cases, this Court has been most zealous to guarantee against possible governmental incursion on those rights. *E.g., Peters v. Hobby*, 349 U.S. 331, 345 (1954); *Ex parte Endo*, 323 U.S. 283, 299-300 (1944). Thus, when the practices of a federal agency appear to conflict with constitutional rights, this Court does not presume the validity of such actions; instead, it presumes that either Congress or the President intended to protect those rights.[65]

The discrimination suffered by respondents – their total exclusion from federal employment opportunities – not only affects the rights of millions of resident aliens for whom this Court has carved out "suspect" class treatment. It also involves an employment interest which this Court has called "the very essence of . . . personal freedom." *Traux v. Raich*, 239 U.S. 33, 41 (1915). Given the importance of the rights and interests involved in this case, basic concepts of administrative and interpretative law require that petitioners demonstrate *explicit* authority for their discriminatory regulation.

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[65] See, *e.g., Cole v. Young*, 351 U.S. 536, 556 (1956); *United States v. Rumely*, 345 U.S. 41, 44-45 (1952); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-53 (1950).

The need for such explicit authorization was itself explicitly recognized by this Court in *Greene v. McElroy*, 360 U.S. 474 (1959). There, the Secretary of Defense revoked Greene's security clearance pursuant to rules which denied him basic procedural protections. The Secretary of Defense contended that an executive order gave him general authority to set conditions for the dissemination of classified information, and that Congress had ratified such action by the appropriation of funds. *Id.* at 506. Writing for this Court, Mr. Chief Justice Warren said such general authorization might be sufficient where there were no sensitive issues of individual rights involved. But, where "substantial restraints on employment opportunities of numerous persons" are imposed which raise issues of constitutional dimension, this Court held that "explicit" authorization was necessary. *Id.* at 506-507.

As the *Greene* decision emphasizes, administrative agencies are not endowed with the authority to make decisions of constitutional import. *Ibid.* Explicit Congressional or executive authorization must be present both to assure that individuals are not inadvertently deprived of cherished rights and to assure that law-makers engaged in careful and purposeful consideration. Such decisions of highest import should not "be assumed by acquiesence or non-action." *Id.* at 507.

The requirement of "explicit authorization" when important rights are at stake evinces a strong judicial policy which has been consistently reaffirmed by this Court.

> [W]hen action taken by an inferior governmental agency was accomplished by procedures which raise serious constitutional questions, an initial inquiry will be made to determine whether or not 'the President or Congress, within their respective constitutional powers, *specifically* has decided that the imposed procedures are necessary and warranted and has authorized their use.' *Hannah v. Larche*, 363 U.S. 420, 430 (1960) (emphasis added).

The following two parts of this Brief disclose the total lack of any specific or explicit authorization for petitioners' promulgation of the discriminatory federal regulation, 5 C.F.R. §338.101.

2. Congress Has Never Explicitly Authorized the President or Petitioners to Deny Federal Employment to Non-Citizens.

To satisfy the explicit authorization standard, this Court has suggested that an administrative agency must demonstrate the enactment of "specific legislation" by Congress on the subject at hand. *Greene v. McElroy*, *supra*, 360 U.S. at 507. It follows, then, that since the Civil Service Act of 1883 and its subsequent amendments[66] are totally silent on the subject of citizenship, no derogation by them of respondents' important individual rights can be assumed.[67] Yet, respondents are aware that inquiry into both the legislative scheme and history is proper to ascertain whether Congress has

[66]Civil Service Act of 1883, 22 Stat. 403, as amended, 5 U.S.C. §§3301, *et seq.*

[67]In the face of a totally "silent" statute or regulation, none of the cases since *Greene* has found the requisite authorization. In *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), this Court recognized the need for explicit authorization (at 890), but found such in a presidentially approved regulation along with "the benefit of an illuminating gloss of history." *Id.* at 892.

authorized a derogation not explicitly stated. *E.g., Hannah v. Larche, supra,* 363 U.S. at 431. Such an examination in the instant case reveals neither direct nor even indirect evidence that resident aliens were to be excluded from the federal service.

Preliminarily, it must be recognized that the plain and clear language of the Civil Service Act (5 U.S.C. §3301) indicates no intention to grant the President – much less petitioners – authority to promulgate orders or regulations with regard to citizenship. In fact, the language of the Act does not even mention citizenship at all. On the other hand, it is most specific about a myriad of other employment criteria. Section 3301(2) of the Act, for example, authorizes the President to ascertain the applicants' fitness as to "age, health, character, knowledge, and ability for the employment sought." This specificity[68] with regard to the five established criteria[69] for fitness can only mean that other particular criteria were not intended by Congress. Such an interpretation – and resulting lack of

[68]It is an established rule of statutory construction that the enumeration of specific items in a statute implies exclusion of omitted items (*expressio unius est exclusio alterius*). *E.g., Addison v. Holly*, 322 U.S. 607 (1944); *Case v. Kelly*, 133 U.S. 21 (1890); see also 2a Sands, *Statutes and Statutory Construction*, §47.23 (4th ed.) (1944).

[69]Although the five criteria did not appear in the 1883 Pendleton Bill as either introduced or passed by Congress, the Congress was aware of existing law setting forth the five criteria and did not wish to "repeal" or "in anywise affect" that provision. See Appendix to S.Rep. No. 576, 47th Cong., 1st Sess., p.23 (commentary by Dorman B. Eaton) (1883). See also R.S. §1753, predecessor statute to 5 U.S.C. §3301.

authorization to exclude aliens – is bolstered by Congress' mandate that the President "best promote the efficiency of [the civil] service." 5 U.S.C. §3301(1). Clearly, this Congressional concern with efficiency would best be served by the largest pool of potential employment candidates, regardless of citizen status. Neither Congressional actions nor logic permits the assumption that resident aliens would not be as good as, and often better than, citizens at performing most functions within the federal civil service system.

A review of the original civil service law passed in 1883 also demonstrates that Congressional silence as to citizenship occurred amidst much particularity and specificity in regard to the most detailed aspects of federal employment. The 1883 Pendleton Act set the salaries of the civil service commissioner, as well as the salaries of the chief examiner, the commission secretary, and the commission messenger.[70] Provision for stationery and office supplies was made by the Act;[71] and both habitual intoxication[72] and nepotism[73] were made specific grounds for exclusion from the federal service. Again, this meticulous attention to detail clearly shows that a requirement of citizenship was not overlooked or merely assumed by the Congress.

[70]14 Cong. Rec. 861, §§1, 3 (S. 133) (1883).

[71]*Id.* at §4.

[72]*Id.* at §8.

[73]*Id.* at §9.

Petitioners suggest that Congressional committee reports[74] and floor debates[75] containing references to

[74]Petitioner's quotation from the Senate Committee Report on the Pendleton Bill (Pet. Br. 77) must be placed in context. The drafter of the Pendleton Bill, Dorman B. Eaton, was heavily influenced by the British civil service system. Kaplan, *The Law of Civil Service* 1 (1958); D. Eaton, *Civil Service in Great Britain* (Harper 1880) (first issued in 1879 as *Report Concerning Civil Service in Great Britain*, 46th Cong., 2d Sess., House Ex. Doc. 1, pt. 7). The British system, at one point, had found it expedient to remove the right to vote and the right to run for elective office from civil servants as a partial check on their abuse of power. See D. Eaton, *Civil Service in Great Britain, supra*, pp. 71-72, 131-132, 146. It was therefore important for the Senate Committee to stress that civil servants under the Pendleton Bill would not "lose any of their rights or avoid any of the responsibilities of citizenship." S. Rep. No. 576, 47th Cong., 1st Sess., p. XII. Thus, it is an unwarranted embellishment to read this quotation as evidence of a Committee "expectation" that all civil servants need be citizens (Pet. Br. 77).

It is likewise unwarranted for petitioners to imply (Pet. Br. 73-75) that the Civil Service Law passed in 1871 intended to exclude resident aliens from federal employment. Act of March 3, 1871, c.114, §9, 16 Stat. 514. Not only was that Act silent in regard to citizenship, but the very same 41st Congress which adopted the Civil Service Law had, only one year earlier, passed the Enforcement Act of 1870. That act, as petitioners readily concede (Pet. Br. 30-32, nn. 18-20), explicitly barred discrimination against non-citizens on grounds of their alienage with regard to the making and enforcing of contracts. Enforcement Act of 1870, 16 Stat. 144, now codified in 42 U.S.C. § 1981, 18 U.S.C. § 242. In fact, Section 17 of that Act made it a criminal offense for a person under color of law, statute or regulation to deprive an alien of the rights guaranteed in Section 16 of the Act. Consequently, it is highly implausible that the Congress which enacted legislation expressing such concern for the rights of aliens would have, in the very next year, *silently* authorized the President or Civil Service Commission to discriminate against aliens in federal employment.

[75]Petitioners' reference to legislative history below the level of official committee reports is of questionable validity. See Mr. Justice Jackson's comments in *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 395 (1951); *see also*, Jackson, "The Meaning of Statutes: What Congress Says or What the Court Says", 34 *A.B.A.J.* 535, 537-538 (1948).

the word "citizen" indicate that some legislators had the "expectation" that all civil service personnel would be citizens (Pet. Br. 77-78). Naturally, individual "expectations" do not amount to Congressional authorization. Moreover, the weight accorded such expectations must be seriously questioned, since the drafters of the Pendleton Act consistently used the term "individual" throughout the entire legislation.[76] Nowhere does the word "citizen" even appear in the Act.[77]

It is further significant that while the Congress has had repeated opportunities to express its intentions regarding alienage, it has chosen not to do so. For example, as petitioners stress (Pet. Br. 76-77), the Pendleton Bill (S. 133) was originally prefaced by a preamble containing a reference to "citizens." S. Rep. No. 576, 47th Cong., 1st Sess., p. XII (1883). This preamble was rejected by the Senate (14 Cong. Rec.

[76]The current codification of the Civil Service Act, 5 U.S.C. §§3301, 3303, also continues to use the term "individual."

[77]The legislative history in 1883 even suggests that the term "citizen" was used by some legislators to refer to residency in a particular state, territory or the District of Columbia, not as a condition of national allegiance. 14 Cong. Rec. 566 (1883) (proposed amendment offered by Senator Pugh). The use of the word "citizen" in such a speaking parlance is recognized by Webster's Seventh New Collegiate Dictionary 151 (1971 ed.), whose primary definition of "citizen" is "an inhabitant of a city or town."

661), thus leaving the Act without any reference to citizenship or alienage. Even petitioners admit (Pet. Br. 78, n. 62) that a companion bill to S. 133 – S. 939, which contained an explicit requirement of citizenship – was rejected by the Senate Committee on Civil Service and Retrenchment and not reported out. This bill, introduced by Senator Dawes, would have made appointments open to citizens only and required vacancies to be filled by citizens as well. Appendix to S. Rep. No. 576, *supra*, at 4 (1883). As this Court has recognized, rejection of such a specific bill on the particular issue at hand reinforces the total absence of any explicit authorization. *E.g.*, *Hannah v. Larche*, *supra*, 363 U.S. at 431.

In *Hannah*, this Court examined the legislative history in order to find explicit authorization. *Ibid.* In the course of this examination, this Court found it dispositive – as to the issue of authorization – that Congress chose one bill over another. Since Congress enacted the bill with the lesser procedural restrictions, this Court found that Congress consciously authorized, in a sufficiently explicit manner, a cutback on procedural safeguards.

> We have no doubt that Congress' consideration and rejection of the procedures here at issue constituted an authorization. . . . *Id.* at 439.[78]

[78]The "rejection" mentioned by this Court was the failure to report Senator Dirksen's bill (S. 83) out of the Committee on the Judiciary, to which it was sent after introduction to the Senate. 102 Cong. Rec. 250 (1957). The bill never made it out of Committee (Index, Pt. 13, 103 Cong. Rec. 857), and the alternate bill (H.R. 6127) was passed by both Houses of Congress and signed into law. Index, Pt. 13, 103 Cong. Rec. 1084. Similarly, the Dawes bill (S. 939) offered in 1883 was also sent to committee from which it never emerged. Index, 13 Cong. Rec. 493, 47th Congress, 1st Sess. (1883).

Applying the *Hannah* test to the case at bar uncontrovertably demonstrates that Congress did not authorize either the President or the Civil Service Commission to make citizenship a criterion of federal employment. To the contrary, by explicitly rejecting the Dawes bill which contained a citizenship requirement and by passing the Pendleton Bill which was silent on citizenship,[79] Congress must be deemed to have rejected a citizenship criterion.

Petitioners also suggest that subsequent acquiescence and/or ratification of their regulation by the Congress or the President constitute the requisite authorization. In particular, they point to appropriation acts which have denied salaries to non-citizens as an indication of Congressional ratification of the exclusionary regulation (Pet. Br. 83-85). This same argument of subsequent acquiescence or approval was made and rejected by this Court in *Greene*:

> If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. *Greene v. McElroy*, *supra*, 360 U.S. at 506.[80]

Yet, this Court in *Greene* ruled that Congressional inaction was not sufficient to show such explicit authorization. Likewise, the mere passage of appro-

[79]Except in the preamble, which was rejected by the Senate, 14 Cong. Rec. 661 (*supra* at pp. 61-62).

[80]See also *Hannah v. Larche*, *supra*, 363 U.S. at 438.

priations for the civil service does not rise to the level of explicit authorization.[81]

Finally, petitioners contend that the Civil Service Commission itself, through its internal procedures and rule making, further legitimatizes the exclusionary policy (Pet. Br. 79-80). Such a contention is no more than a classic "bootstrap" argument. Under this type of reasoning, any agency – through a flurry of promulgated regulations and reports – could ensure sanction for any action or policy not specifically authorized in enabling legislation or executive orders. The particular language and general policies which underlie this Court's decision in such cases as *Greene* and *Hannah* will clearly not tolerate such "proof" of authorization.

3. The President Has Never Explicitly Authorized Petitioners to Deny Federal Employment to Non-Citizens.

As there is no Congressional authorization, neither is there any Presidential authorization for petitioners' discriminatory regulation. The regulation purportedly was issued to implement Executive Order No. 10577 (promulgated by President Eisenhower on November 22, 1954, 19 Fed. Reg. 7521), which itself was issued under the authority of the Civil Service Act. See *Wong v. Hampton*, *supra*, 500 F.2d at 1034. As the Act did

[81] Even the lower appellate and district courts in this case found that "[t]he appropriations acts are not the basis for the regulations." *Wong v. Hampton*, 500 F.2d at 1034. These courts implicitly recognized that petitioners' argument concerning subsequent ratification also proves too much. If Congress felt that the Civil Service Act excluded aliens from federal employment, there would have been no need to include limitations on aliens in the appropriations legislation.

not discriminate against resident aliens, neither could the Executive Order, whose scope was delimited by the authorizing statute (see subsection III(A)(2), *supra*). Moreover, this Executive Order states in pertinent part:

> The Commission is authorized to *establish standards* with respect to citizenship . . . which applicants must meet to be admitted to or rated in examinations. Executive Order No. 10577, § 2.1(a) (emphasis added).

The language of this order on its face shows that President Eisenhower directed the Commission to select certain employment positions to be reserved for citizens only (positions requiring the highest loyalty and security) and to establish standards between those security jobs and other positions. See *Wong v. Hampton*, *supra*, 500 F.2d at 1040 (constitutionally permissible distinctions between aliens and citizens in security positions). The phrase "establish standards" in no way contemplates a complete exclusion of non-citizens, but explicitly mandates that standards and distinctions based on citizenship be drawn. Petitioners' response to this order – issuance of the totally exclusionary regulation – grossly exceeds both the language and intent of the Presidential order.[82]

In fact, given the significant developments concerning the rights of aliens during the first half of this century, President Eisenhower's order obviously was intended to loosen the constraints imposed by the previous exclusionary rules promulgated under Presidents Arthur[83] and Theodore Roosevelt.[84] Beginning with

[82] See Subsection B of Section III of this Brief, *infra*.

[83] Rule XI, First Report of the United States Civil Service Commission 47 (1884).

[84] Rule V, Twentieth Report of the United States Civil Service Commission 48 (1904).

Yick Wo v. Hopkins, 118 U.S. 356 (1886), this Court in the succeeding decades opened up a significant number of rights for non-citizens. Aliens were granted the right to work for a living in the common occupations of the land,[85] to acquire state resources,[86] to own land,[87] and to reasonable compensation for property taken by the state.[88] All of these decisions expanding the rights of aliens took place *after* the passage of the 1883 Civil Service Act and *before* issuance of the 1954 Executive Order. This historical context further demonstrates why the order required reasonable distinctions to be made between citizens and non-citizens, not the outright exclusion of non-citizens.

Finally, since no history exists to explain the phrase "establish standards" in Executive Order No. 10577, it must be given its natural and plain meaning. Under such interpretation, there can be no doubt that this language does not permit – let alone require – the exclusion of non-citizens from the federal civil service. Nor does the language offer any support to petitioners in meeting their burden of demonstrating explicit authorization.[89] Lacking either the explicit authority of Congressional legislation or an executive order, the discriminatory regulation must thus be deemed an illegal barrier to

[85] *Truax v. Raich*, 239 U.S. 33 (1915).

[86] *Takahashi v. Fish & Game Comm.*, 334 U.S. 410 (1948).

[87] *Oyama v. California*, 332 U.S. 633 (1948).

[88] *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931).

[89] *Greene v. McElroy*, *supra*, 360 U.S. at 507; *Nielsen v. Secretary of Treasury*, 424 F.2d 833, 846 (D.C. Cir. 1970).

respondents' rights to employment opportunities in the federal government.

B. Petitioners' Exclusionary Regulation Contravenes Executive Orders Nos. 10577 and 11478.

Just as administrative regulations must be authorized by the legislature or the executive, it is likewise axiomatic that such regulations may not conflict with the express provisions of any superior order.[90] In the instant case, this axiom requires that the Civil Service Commission – as an agency within the executive branch of government – not violate express orders promulgated by the executive. Yet, petitioners' discriminatory regulation which bars resident aliens from federal employment squarely contravenes both Executive Order No. 10577[91] and Executive Order No. 11478.[92]

In Executive Order No. 10577, President Eisenhower ordered that:

> . . . The [Civil Service] Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted [to the Service]. . . . *Id.* at § 2.1(a).

[90] *E.g.*, *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *Service v. Dulles*, 354 U.S. 363, 372 (1957); *Jalil v. Hampton*, 460 F.2d 923, 927 (D.C. Cir.), *cert. denied*, 409 U.S. 887 (1972).

[91] 19 Fed. Reg. 7521 (Nov. 22, 1954).

[92] 34 Fed. Reg. 12985 (Aug. 8, 1969).

Plainly, the quoted portion of this order establishes those matters of qualification for employment within which the Commission, in reliance upon its expertise, is to develop and apply criteria and standards. No one would suppose that this directive would entitle petitioners to reject every applicant who, for example, lacked post-graduate education. To the contrary, the Executive Order requires standards to be developed. Were petitioners uniformly to reject applicants because they lacked post-graduate education – and thus disregard their duty to develop standards concerning what education might be requisite to particular positions – they would be turning this Executive Order on its head.

Yet, this is precisely what petitioners have done with another of the articulated qualifications: citizenship. Rather than establish standards, as the order directs, petitioners have used the fact of citizenship as a device for total exclusion of those from among whom it is expected to select. 5 C.F.R. §338.101. Since a blanket exclusion cannot sensibly constitute the establishment of standards, petitioners' regulation thus perverts and contravenes Executive Order No. 10577.[93]

It is equally clear that the regulatory ban against resident aliens offends Executive Order No. 11478. As its title states, this order promotes and guarantees "Equal Employment Opportunity in the Federal Government." The preface of this 1969 order recites:

> [I]t has long been the policy of the United States government to provide equal opportunity in federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality (A.21).[94]

[93]See Comment, "Aliens and the Civil Service: A Closed Door?", 61 *Geo. L.J.* 207, 210 (1972).

Like many executive orders, Executive Order No. 11478 relies specifically upon constitutional authority for its force and effect.[95] Yet, respondents need no

[94]Clearly, as President Eisenhower is among those "recent Presidents," so is Executive Order No. 10577 among those measures that have "long . . . provide[d] equal opportunity."

[95]In 1969, when Executive Order No. 11478 was issued, Title VII of the 1964 Civil Rights Act, 78 Stat. 253, 42 U.S.C. §§2000e *et seq.*, did not apply to federal employment. Thus, while the Executive Order also invokes the authority vested in the President by statute, Title VII would not have been among those statutes.

Similarly, petitioners' reliance upon *Espinoza v. Farah Mfr. Co.*, 414 U.S. 86 (1973), is thus wholly misplaced (Pet. Br. 86-88). *Farah* "involve[d] interpretation of the phrase 'national origin' in Title VII of the Civil Rights Act of 1964." 414 U.S. at 87. The question therefore posed in that case was a statutory one, concerning the precise obligation of a legislative enactment. On the other hand, the instant case involves inherent constitutional obligations which have been imposed on petitioners through the Presidential order. The potential differences in the scope of these two types of obligations are manifest. For example, Title VII's general non-discriminatory purpose would not prohibit private employers from discharging red-haired workers on the basis of the color of their hair, since the statute does not cover this. Yet, the question of petitioners' ability under the Constitution and Executive Order No. 11478 to discriminate on the basis of hair color is an entirely different matter. As Section I of this Brief demonstrates, *supra*, all arbitrary and invidious discriminations run afoul of constitutional due process strictures.

Likewise, this Court's decision in *Morton v. Mancari*, ___ U.S. ___, 94 S. Ct. 2474 (1974), upon which petitioners also rely (Pet. Br. 88-89), is no more relevant. That case involved only considerations of statutory construction in regard to employment preferences for American Indians, a group explicitly protected by Title VII, the statute at issue.

recourse to extrinsic matter to demonstrate that petitioners' regulation directly contravenes Executive Order No. 11478. The order, on its face, manifests its purpose to prohibit discrimination against aliens like respondents. The last sentence of Section 6 of the order states:

> This order does not apply to aliens employed outside the limits of the United States (A.22).

Since executive orders are not issued as mere idle gestures, this language can only mean that the executive order *does* apply to resident aliens *within* the limits of the United States.[96] While petitioners' brief ignores the force of this point, their silence reinforces both its

[96]A comparative analysis of executive orders regarding civil service, which have been promulgated by Presidents over the past 36 years, further reveals that Executive Order No. 11478 prohibits discrimination against resident aliens in domestic federal employment. In Executive Order No. 7915, issued in 1938, citizenship was made an express requirement for those seeking civil service employment. 3 Fed. Reg. 1521 (1938), as amended by Executive Order No. 8587, 5 Fed. Reg. 4445, 4446 (1940). Yet, less than a decade later, President Truman promulgated Executive Order No. 9830, which expressly revoked Executive Orders Nos. 7915 and 8587. President Truman's order (which contained the exact language regarding citizenship as Executive Order No. 10577 issued in 1954) thus manifested a clear executive intent—reaffirmed in 1969 in Executive Order No. 11478—to eliminate discriminatory barriers against aliens in federal employment. Executive Order No. 9830, § 2.1(a) (1947).

merits and its express rejection of petitioners' discriminatory regulation.[97]

[97]The appellate court below agreed that respondents had "good reason" for their argument that petitioners' regulation conflicted with the Presidential order against employment discrimination. *Wong v. Hampton, supra*, 500 F.2d at 1036. Yet, the appellate court said the executive order was not "judicially reviewable . . . since [it] merely declares a general policy." *Ibid.* It is hardly surprising that the appellate court offered no support for this view, since it is clearly erroneous. *E.g., Espinoza v. Farah Mfr. Co., supra*, 414 U.S. at 89-90; *Cole v. Young, supra*, 351 U.S. at 551-558; *see also Greene v. McElroy, supra*, 360 U.S. at 500-502; *Cafeteria Workers v. McElroy, supra*, 367 U.S. at 891; *Jalil v. Hampton, supra*, 460 F.2d at 927; *Contractors Ass'n of Eastern Penn. v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. den.*, 404 U.S. 854 (1971); *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629, 632, n.1 (5th Cir.), *cert. den.*, 389 U.S. 977 (1967).

Nor did the lower court explain what was meant by its characterization of the order as merely "declaring a general policy." Clearly, the 1954 Executive Order No. 10577—which the lower court both reviewed and enforced (*Wong v. Hampton, supra*, 500 F.2d at 1034)—is even more general in its broad delegation of authority; in contrast, Executive Order No. 11478 deals with the relatively narrower area of employment discrimination. Moreover, on its face, Executive Order No. 11478 is a directive rather than a general order.

> The Civil Service Commission *shall* provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs for the civilian employees . . . in order to assure that personnel operations in Government departments and agencies *carry out the objective of equal opportunity for all persons. Id.* at § 3 (emphasis added).

Sections 3, 4, and 5 of Executive Order No. 11478 also command petitioners to evaluate agency programs, mediate discrimination complaints, set up impartial review systems, and perform other tasks to reduce discrimination. Each of these commands is similarly reflective of a directive rather than a "general policy."

CONCLUSION

For the reasons stated above, respondents respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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Respectfully submitted,

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